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Particular Contracts: Sale

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the vendor petroleum company had not extinguished the 1931 servitude prior to the sale. In view of the *Tritico* decision and the broad estoppel applied in the original opinion in the instant case, defendant argued that it was put "in the position of having lost both sides of the same question."[15] After conceding the correctness of this contention, the court held that the estoppel applied in the original hearing was too broad. Since plaintiff had agreed to a mineral reservation in the deed, the court concluded that the petroleum company would not have been estopped from asserting the 1931 servitude during the 10 years following the sale. However, after that period the petroleum company was estopped from asserting the interruption of prescription by drilling which had occurred on contiguous lands. The rationale of the decision was that Hodges should not be placed at a disadvantage because he had no notice that a mineral servitude existed on the land at the time he bought. Likewise, he should not be allowed to escape the existence of a charge against the land during the 10 years following the sale because he assented to a mineral reservation. By applying the doctrine of limited estoppel, the court felt that an equitable solution was reached.

PARTICULAR CONTRACTS

SALE

*J. Denson Smith**

Some interesting and novel questions were presented to the court in the case of *Daum v. Lehde*.[1] Plaintiff was the purchaser in a contract by which the defendant agreed to sell certain improved real estate. Prior to the completion and delivery of the act of sale the improvements were partially destroyed by fire. It appears that the defendant rejected the plaintiff's demand that he transfer the property to plaintiff together with his interest in a fire insurance policy on the improvements. Plaintiff then sued claiming alternatively (1) the delivery of the property in substantially its condition before the fire; (2) the delivery of the property in its damaged condition together with the sum re-

15. Hodges v. Long-Bell Petroleum Co., 121 So.2d 831, 840 (La. 1960).

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1. 239 La. 607, 119 So.2d 481 (1960).

ceived covering the insurance; (3) the delivery of the property in its damaged condition less $12,000.00, representing the amount necessary to restore the property to its former condition; (4) the return of double the deposit. The district court's judgment awarding the plaintiff a simple return of the amount deposited was affirmed. The court found without merit the demand that defendant restore the property. It rejected plaintiff's claim for the property plus the insurance money by finding that Article 2220 of the Civil Code on which plaintiff relied applies only to claims sounding in tort and not to a claim founded on a contract of insurance. It found that plaintiff's claim for an allowance on the purchase price on the basis of Article 2455 of the Civil Code was not timely made.

Three basic situations may be presented where property which is the subject of a sales agreement is destroyed in whole or in part without the fault of either party. (1) It may be so destroyed, unknown to the parties, at the moment it is sold. This situation seems to be controlled by Article 2455. It provides that the buyer may either abandon the sale, or retain the preserved part, by having the price thereof determined by appraisement. (2) The property may be so destroyed after a contract for its sale has been formed but before the occurrence of a condition which suspends the transfer of ownership. This situation is controlled by Article 2044. It expressly provides that the buyer may either elect to dissolve his obligation to take it and pay the price, or he may "require the thing in the state in which it is, without diminution of the price." (3) The property may be so destroyed after it has been sold but before it has been delivered. In this event, Article 2155 is controlling. Under it, since ownership has passed to the buyer with its accompanying risk, the only obligation of the debtor is to deliver the thing in the state in which it then is. The buyer must, of course, pay the price. However, under Article 2220, if the seller has any claim for indemnification, he must make it over to the creditor.

On the basis of this analysis, inasmuch as in the present case the transfer of ownership, or sale, was suspended pending the execution and delivery of an act of sale, Article 2044 was controlling rather than Article 2455. This being true, the buyer had no claim to the insurance money or to a reduction in the price. He could either withdraw, or take the thing without diminution of the price, as the former provides. Since the court's opinion

rejected the buyer's claim to the thing at a reduced price, the result seems certainly correct. However, this result was reached on the assumption that Article 2455 applied and because the buyer did not make his demand "prior to or at the time set for the sale" rather than because he had no such right. Of course, if Article 2455 is applicable to such a case, this method of disposing of the claim was in order. But the language of the article indicates that it applies to a sale rather than to an agreement under which the sale is suspended until some later event, which was the kind of transaction before the court inasmuch as the transfer of ownership was suspended pending the delivery of an act of sale. It refers to "the thing sold" and deals with its destruction "at the moment of the sale." It provides that the purchaser may "retain" — because ownership has passed — the preserved part by having the price thereof determined by appraisement. Furthermore, if Article 2455 be construed to apply to a case where the transfer of ownership is suspended, it would be in conflict with Article 2044.

It appears, also, that Article 2220, notwithstanding some expressions to the contrary by French writers, likewise applies to a case where the transfer of ownership has already taken place at the time the loss occurs although the thing has not yet been delivered. It is, in effect, a continuation of the preceding article which deals expressly with the loss of the "certain and determinate substance which was the object of the obligation." This is language customarily employed in the Code where there is agreement for the sale of a specific, identified thing, at a fixed price. In such a case, there being a concurrence of thing, price, and consent, under the French code and our Article 2456 as well, the sale is perfected and the property in the thing is acquired of right by the purchaser.[2] Furthermore, the official discussions of the projet of the Code Napoleon show conclusively that Articles 1302 and 1303 of that Code (our Articles 2219 and 2220) deal with a perfected sale and contain reflections of the rule *res perit domino* and its exceptions. Although the language of Article 1303 is not too exact, the discussions also show that the theory of the draftsmen was that since the thing belongs to the buyer, i.e., since ownership has passed, any right to indemnification for its loss belongs to him.[3] It is also to be noted that the

2. An act of sale translative of ownership is required by our jurisprudence in cases involving immovables. See Peck v. Bemis, 10 La. Ann. 160 (1855).

3. In the official communication to the Tribunal, Tribune Favart explained

article merely says that the seller is bound "if he has any claim" for indemnification, to make it over to the buyer. And, finally, the application of this article to a case where the transfer of ownership is suspended and the loss occurs prior to the occurrence of the suspensive condition, would create an apparent conflict with Article 2044. It seems reasonable to believe that if the lawmaker had intended to say that where title has not passed to the buyer — the situation dealt with in Article 2044 — the buyer could either withdraw, or take the thing without any diminution of the price, as therein stated, or could take the thing and require the seller to make over to him any claim that he may have for its destruction, the latter would have been said in the same article or at least at the same place in the Code. Maybe this ought to be the law, but, if so, the Code seems to be against it.[4]

In *Poche v. Ruiz*[5] the court followed its recent holding in a similar case[6] and gave judgment for a purchaser for a return of double the amount deposited by him in connection with a contract to purchase an immovable although the defendant's failure

these provisions, in part, as follows: "When the thing has perished or is lost without the debtor being responsible as provided by the law, he is bound only to cede to the creditor the rights or actions in indemnity to which the loss may give rise. The same principles should apply in the case where the thing has been taken out of commerce. I have sold to Jean three arpents of land that I am not bound to deliver for a month; before the month the public authority takes one of the three arpents for a railway; I am not then obligated to deliver this arpent. As to this arpent, the obligation is extinguished; but the indemnity that the government pays should accrue to Jean. The debtor is not bound to make any step or move; he is obligated only to cede his rights and actions to his creditor." 8 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 368 (1836).

And Tribune Mouricault, in explaining the draft to the legislative corps, said of Articles 1302 and 1303: "The loss of the thing due is a sixth cause of the extinction of the obligation. When the thing perishes, is taken out of commerce, or is lost in such a manner that its existence may be disregarded, the obligation is extinguished if this is without the fault of the debtor, if he is not charged with fortuitous events, and if he is not in default. Even when he is in default if he is not charged with fortuitous events, the obligation is destroyed when the thing would have perished also in the hands of the creditor. For the rest, the debtor must prove the fortuitous event he alleges, and, when he is not bound, he has only to preserve what remains of the thing or the actions and indemnities that replace it; all of this belongs of right to the creditor like the thing itself which it is no longer possible to give him." *Id.* at 438.

4. The draftsmen of our Code repeated the provisions of Article 2044 in Article 2471 without again indicating that the buyer should be entitled to claim any cause of action that might have accrued to the seller against any third party responsible for the destruction of the thing prior to the satisfaction of a suspensive condition. It might well be asked also why, if the buyer would be entitled to claim such a cause of action in the event of partial destruction of the thing he should not be entitled to claim the same in the event of its total destruction. These articles provide merely that in the latter case "the obligation is extinguished" and "the loss is sustained by the seller."

5. 239 La. 573, 119 So.2d 469 (1960).

6. Ducuy v. Falgoust, 228 La. 533, 83 So.2d 118 (1955).

to convey a clear title was occasioned by a pending lawsuit. As in the earlier case, the holding was based on a contract provision which was found to provide for the recovery allowed. However, the opinion also referred as with approval to an intermediate holding to like effect in a case where as far as the opinion shows no such contract provision was involved.[7] The broader base of the latter case seems to be entirely supportable.[8] Of course, the parties could contract so as to relieve the seller of the risk of being unable to convey a valid title but the instant case disclosed no facts strong enough to support such a conclusion. An effort on the part of the purchaser to show that an additional payment made ten days after the payment of the initial ten percent should be counted as part of the deposit for the purpose of computing the amount due him was rejected. This additional amount was treated by the court as simply the payment by the purchaser of the full cash portion of the purchase price, a position fully sustained by the facts.

The question of whether title had passed to a trade-in automobile was presented to the court in *Jackson Motors, Inc. v. Calvert Fire Insurance Co.*[9] On its resolution depended recovery under a policy of fire insurance. The conclusion of the court based on a careful examination of the facts was that the loss occurred prior to the transfer of ownership which had been subjected to a suspensive condition which remained unsatisfied at such time. In short, the sale of the new car on which the buyer's old car was to be taken in trade was suspended under the agreement until the buyer's credit had been approved by a finance company. The evidence failed to establish that the credit had been approved and notification thereof given prior to the fire. In consequence, the buyer's insurable interest had not been lost and a right of action against the insurer accrued in his favor. Insofar as the agreement for the delivery of the old car by way of trade-in was concerned, it amounted to an exchange, but transfer of ownership to the thing exchanged is governed by the same rules that govern the ordinary contract of sale.[10]

Where two of four plaintiffs transferred their interests in a

7. Caplan v. Airport Properties, 231 La. 1071, 93 So.2d 661 (1957).
8. See Smith, *Recovery of Damages for Non-Delivery and Eviction in Louisiana — A Comparison*, 17 LOUISIANA LAW REVIEW 253 (1957); *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Conventional Obligations*, 18 LOUISIANA LAW REVIEW 39, 40-41 (1957).
9. 239 La. 921, 120 So.2d 478 (1960).
10. LA. CIVIL CODE art. 2667 (1870).

certain suit pending an appeal thereon by the defendant, the latter's motion for a remand in order to exercise the right of litigious redemption was granted notwithstanding a delay of two months after notification of the transfers. Under the circumstances of the case the motion was found not untimely. The court undertook to protect the remaining plaintiffs against undue delay resulting from a remand by retaining the appeal in its position on the preference docket. In addition, the trial judge was instructed to hear the evidence on the remand as soon as possible.[11] When the case was returned to the Supreme Court, it concluded that the negotiations between the parties had never ripened into an enforceable contract for lack of agreement between them.[12]

In *Hodges v. Long-Bell Petroleum Co.*[13] it was held that since the vendors of a tract of land warranted the vendee against all legal claims and demands whatsoever, except those expressly reserved and excepted, they were estopped to assert rights stemming from a former mineral reservation not declared in the act of sale in question. Application of the principle was amply supported by the facts.

The court in *Jones v. Jones*[14] found inapplicable the doctrine that where the co-owner of property purchases it at a tax sale, the purchase inures to the benefit of all of the co-owners. The evidence established that the purchase of the property by the co-owner occurred not at the tax sale but from a third party who purchased at the tax sale and after the period of redemption had expired. The third party was found to be not an agent or representative of the former owners, and not an interposed party. No relationship of trust was established between the purchasing co-owner and the others inasmuch as he was not in possession of the property at the time the taxes were due. Hence no basis was found for the application of the equitable doctrine on which the plaintiff was relying.

The plaintiff in *Wood v. Police Jury of the Parish of Jefferson*[15] lost his suit to recover the value of certain lots which he claimed to have redeemed after their adjudication to the state

11. Clement v. Sneed Brothers, 238 La. 614, 116 So.2d 269 (1959).
12. 240 La. 48, 121 So.2d 235 (1960). The case is favorably noted in 20 LOUISIANA LAW REVIEW 787 (1960).
13. 240 La. 198, 121 So.2d 831 (1960).
14. 240 La. 174, 121 So.2d 734 (1960).
15. 240 La. 1, 121 So.2d 218 (1960).

for unpaid taxes, because he did not show that he made the payment to the treasurer of the state required by R.S. 47:2224 where more than three years have elapsed since the adjudication of the property to the state. His claim that he had satisfied all conditions entitling him to a certificate of redemption from the Register of the State Land Office by the payment of all of the taxes and costs due to the Tax Collector of Jefferson Parish, in keeping with the prevailing custom in the parish, was found without merit on the ground that such a custom cannot prevail over positive law.

In 1955 the court held in the case of *Koerber v. New Orleans*[16] that, where a public authority having the power of eminent domain takes possession of the property of another by mistake without undertaking to expropriate it legally, the value of the property is to be determined as of the time of the expropriation which, in that case, took place when the city filed its answer to plaintiff's suit for the value of the land. Justices McCaleb and Hawthorne dissented. Their view was that the value of the land should be measured as of the time of the actual taking of the property. The taking for a public purpose was considered by them as not being an illegal act but the establishment of a servitude, and they contended that the compensation for the taking should be fixed as of the date of the servitude's creation. During the last term the court in *A. K. Roy, Inc. v. Board of Commissioners for Pontchartrain Levee District*[17] found the rule of the *Koerber* case not controlling. This was on the ground that in the instant case the owner had full knowledge that his property had been taken and did nothing about it. Hence it was held that he should not be permitted to reclaim it and should be restricted to a claim for compensation based on the value of the property at the time of the actual taking. Although a considerable period of time had elapsed between the actual taking and the claim of expropriation in the *Koerber* case, the court explained that the plaintiff had no knowledge of the taking for three years and thereafter carried on negotiations with the city for another period of three years before resorting to suit. This explanation of the *Koerber* case seems to be a proper restriction of the holding therein.

16. 228 La. 903, 84 So.2d 454 (1955).
17. 238 La. 926, 117 So.2d 60 (1960).

EXPROPRIATION

Of the ten cases examined involving expropriation proceedings, eight of them were concerned primarily with problems of valuation. Of this latter number, six involved simply the application of such well-known principles as that the proper measure of the owner's recovery is the market value of the property taken; that this means the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy; that the best guide to a determination of market value is comparable sales; that where no comparable sales are available the court may consider other factors such as replacement cost less depreciation and the extrinsic value or value to the owner. The cases recognize also that severance damages are recoverable and that the measure thereof is the difference between the market value of the remaining property immediately before and immediately after the expropriation.[1] The remaining two cases dealt with the question of whether a landowner, part of whose property is expropriated for highway purposes, is entitled to an award which includes assessments to be made for street improvements and sidewalks. In the first case, *New Orleans v. Giraud*,[2] the amount recovered included the cost of constructing sidewalks. In the second, *Shreveport v. Worley*,[3] an owner's claim to compensation to cover a projected assessment for the construction of sidewalks and the re-paving of the street was disallowed. In the *Worley* case the court explained the allowance of the cost of constructing sidewalks in the *Giraud* case by saying that the city did not contest the claim, and pointed out that recovery for street paving was not passed upon because there was no evidence to show that the street was to be paved and an assessment levied to cover the cost. It concluded, therefore, that the court was not called upon in the *Giraud* case to make any determination concerning the existence of a right under such circumstances to recover the cost of sidewalks or paving, and held that no such recovery is legally permissible. This was put on the ground that since, under the law, municipalities may levy assessments on abutting prop-

1. State v. Barber, 238 La. 587, 115 So.2d 864 (1959); State v. Barrow, 238 La. 887, 116 So.2d 703 (1959); State v. Esnard, 238 La. 903, 117 So.2d 52 (1960); State v. Central Realty Investment Co., 238 La. 965, 117 So.2d 261 (1960); State v. Havard, 239 La. 133, 118 So.2d 131 (1960); State v. Hub Realty Co., 239 La. 154, 118 So.2d 364 (1960).
2. 238 La. 278, 115 So.2d 349 (1959).
3. 240 La. 117, 121 So.2d 506 (1960).

erty for street improvements without regard to any benefit or detriment which may result therefrom, the mere fact that the improvements are to be made in part on land taken for such purposes will not support a recovery by the property owner of the costs assessed against him.

The court had two opportunities further to determine the standing of lessees in condemnation proceedings but declined to do so in both instances. In the case of *State v. Schnitt*,[4] the court found it unnecessary to decide whether the Department of Highways, acting pursuant to the provisions of R.S. 48:441-460, must deposit separate sums to cover the interests of the owner and the lessee. Because the lessee had been made a party, it likewise declined to decide whether or not a lessee is a necessary party in condemnation proceedings. It referred, however, to a previous holding that a lessee is not an improper party. In *State v. Sumrall*,[5] the court again found it unnecessary to determine whether or not the Department of Highways must deposit separate sums to cover the interests of owners and lessees.

LEASE

A lessee must prove that the lessor is responsible for a fire on the leased premises in order to recover against the latter for a loss resulting therefrom. At the same time, if bailed goods are destroyed while in the possession of the bailee, he must prove that there was no lack of due care on his part. An application of these rules in *Brown & Blackwood v. Ricou-Brewster Building Co.*[1] resulted in a judgment for the lessor and a remand of the case on the depositor's claim against the lessee, as depositary, to cover the loss of a painting loaned to the latter for display purposes.

4. 238 La. 1069, 117 So.2d 595 (1960).
5. 240 La. 147, 121 So.2d 724 (1960).
1. 239 La. 1037, 121 So.2d 70 (1960).